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# IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

#### FIRST APPELLATE DISTRICT

#### **DIVISION FIVE**

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD WILLIAM MCDOWELL.

Defendant and Appellant.

A119754

(Sonoma County Super. Ct. No. SCR-33484)

Appellant was convicted by jury of first degree murder (Pen. Code, § 187, subd. (a)), attempted robbery (§§ 664, 211), and burglary (§ 459). The jury found true two special circumstance allegations, that the killing was committed during the commission of the attempted residential robbery, and during the commission of a residential burglary. (§ 190.2, subd. (a)(17).) Allegations that a principal was armed during the commission of these offenses, (§ 12022, subd. (a)(1)) and that appellant personally used a deadly weapon, a knife (§ 12022, subd. (b)(1)), were also found to be true. The court separately found that appellant had suffered a prior serious felony conviction under sections 667, subdivision (a)(1) and 1170.12.

Appellant was sentenced to a term of life without possibility of parole, with additional consecutive terms for use of a deadly weapon and for the prior serious felony

All further statutory references are to the Penal Code unless otherwise indicated.

<sup>&</sup>lt;sup>2</sup> Appellant's codefendant, Tyson David Hutchison (Hutchison) was jointly tried, but before a separate jury. He is not party to this appeal.

conviction. He appeals, contending that the testimony of two eyewitnesses, identifying him as one of two assailants, should have been excluded by the trial court, and that he was deprived of due process of law by the admission of such evidence. We find no error and will affirm.

#### TRIAL EVIDENCE

The decedent, James Meehan (Meehan), was a methamphetamine dealer. On June 9, 2002, Meehan lived at 309 Boyce Street, Santa Rosa. At about 3:00 a.m. on that date, Meehan was at his residence with Micki Alger (Alger), with whom he had a periodic dating relationship and with James Linnell (Linnell).

Alger responded to a knock on the door and two men entered the house. One man was armed with a "palm knife," with the handle gripped in the palm, and the blade protruding through the fingers. The second individual carried a small black revolver, which he pointed at Meehan, Alger, and Linnell. One of the two men said "Give me your stuff" and the man with the knife said "Where's the shit?" When Meehan said "There's nothing here," the gunman fired a shot into the floor at Meehan's feet. Meehan then said "[K]ill me if you're going to kill me." At that point Alger grabbed a case containing a cordless electric drill and struck the man with the knife in the chest with it. Meehan appeared to attempt to grab the gun. Two shots were fired and Meehan fell, grabbing his chest and bleeding from the mouth. Both intruders fled. Meehan died as a result of two penetrating gunshot wounds to his torso. The wounds showed stippling, but no soot, indicating that they were fired from a distance of one to four feet.

Both Alger and Linnell identified appellant at trial as the intruder with the knife.<sup>3</sup>

<sup>&</sup>lt;sup>3</sup> This evidence, which is the focus of appellant's contentions in this appeal, is discussed in detail *post*.

### Other Witnesses

In June 2002, witness Cheryl Pettway lived at the Fairy Ring Campground in Guerneville. Appellant also lived there, and codefendant, Hutchison, frequented the campground. In March 2003, she gave a palm knife (People's Exhibit No. 1) to Santa Rosa Police Detective Lance Badger, stating that appellant had given it to her. On cross-examination she testified that she was regularly drinking and using methamphetamine in March 2003, and could not recall precisely when appellant had given her the knife. Micki Alger testified that People's Exhibit No. 1 looked similar to the knife she had seen on the night of the murder.

Pamela Shirley testified that on the weekend of June 8-9, 2002, she allowed appellant, whom she had known for years, and codefendant Hutchison to house sit at her residence in Forestville while she was away staying with her boyfriend. A .22-caliber pistol (People's Exhibit No. 15) was in the nightstand of her dresser. She told Hutchison where the gun was. She had placed a hinged lock on the nightstand drawer, but it could be removed by simply unscrewing the external hinge. The gun was in the drawer when she returned. She had obtained the pistol from a friend, Frank Paganini, for protection. Paganini gave the gun to Santa Rosa Police Detective Lance Badger on February 28, 2003. The pistol was positively identified as the murder weapon by ballistic comparison with the slugs recovered from Meehan's body.

Pamela Shirley's daughter, Tiffani Shirley, lived with her mother in June 2002. She knew both Hutchison and appellant, with whom she had grown up. In February 2003, in a conversation at appellant's father's house, appellant told her that he had been at the scene of the homicide in June 2002, and that he had to leave town afterward. Shortly before her testimony at trial, appellant called her from jail and asked her to change her story, omitting anything placing appellant at the scene of the murder. He suggested how she should explain the discrepancy from her prior statement, and told

her that she could not be charged with perjury, since her prior statement was not under oath. The conversation was recorded, and the tape was played for the jury.

Sandy Brady was an acquaintance of appellant who also lived at the Fairy Ring Campground in Guerneville in 2002. One evening appellant asked her to give him a ride to a neighborhood in Santa Rosa. They drove around trying to find a particular house, and appellant made a phone call when he could not find it. At some point appellant left the car, returning after about 15 minutes. After he returned, they encountered an acquaintance of both, "Glen," and they walked to Glen's house in the neighborhood. They then returned to Guerneville. On a later occasion, appellant was upset and asked Brady to look at a newspaper article regarding a homicide. He told her that Hutchison had killed someone when appellant and Hutchison had gone back to the house. In November 2002, Brady went with Detective Badger to attempt to identify the location of the house she and appellant had tried to find in Santa Rosa. They went to Boyce Street, where she pointed out a vehicle she recognized in the driveway of Glenn Jatho.

Jatho lived on Boyce Street, across the street from decedent Meehan, at the time of the murder. Jatho testified that he saw appellant and Brady in the neighborhood "[a] couple of days" before the homicide, and spoke to them. Although he identified both appellant and Brady from photographs as acquaintances, he did not identify appellant in the courtroom.

Harry Siegel, who was serving a sentence in San Quentin prison at the time of his testimony, spoke to both Hutchison and appellant about the killing following an earlier release from prison on June 11, 2002. He secretly recorded, at the behest of Kathy Fuller, admissions by Hutchison concerning the killing because Fuller was afraid of Hutchison, and they considered that the tape would provide "insurance." This tape, on which

<sup>&</sup>lt;sup>4</sup> Siegel told Fuller that he could "take out" Hutchison, but decided that "that wasn't an option," and so got the tape recorder instead.

Hutchison purportedly admitted shooting "some dude" was not introduced in appellant's trial.

Siegel spoke to appellant at the Fairy Ring Campground around June 11, 2002. Appellant told him that he and Hutchison had gone to the victim's home to "tak[e] somebody's stuff," or to "rip off a dealer," that he had not known that Hutchison had a gun, and was dumbfounded when Hutchison fired. He also said that a girl had hit him in the head with a briefcase before the shooting. Siegel attempted to help appellant by getting him out of town. Siegel recalled having seen appellant in the past with a T-handled knife, with a blade which protruded through the fingers. He viewed a drawing prepared by the police sketch artist with Alger's assistance, and testified that it resembled appellant, as he appeared in June 2002. Siegel had several prior felony convictions, and had served terms in state prison. He received no consideration for his testimony, and had a "rat jacket" (i.e., was labeled as an informant) as a result of testifying.

Katheryn Fuller, a friend of appellant, recalled a conversation, which occurred before the killing, at which her boyfriend, Joe Kampman, and appellant were both present. Kampman discussed "some guy" in Santa Rosa who owed him money, and said that if the guy did not have money, he had drugs, and that he would be "easy to take." In June 2002, Kampman showed her a newspaper article about a homicide in Santa Rosa. She discussed the article with appellant, who told her that Hutchison had shot someone, and that someone had hit him over the head at the time. He also said that Brady had given him a ride to Meehan's residence prior to the killing. She became fearful of Hutchison, and asked Harry Siegel for assistance because "he was a big guy that I guess would offer protection to people." Fuller had four felony convictions and was regularly using methamphetamine in 2002, although she said that she had been "clean" for about three years as of the time of her trial testimony.

Charles Darren Purkey testified to being present at a conversation in June 2002 between Kampman, Hutchison, and appellant regarding someone who had a lot of money and drugs in a safe. Appellant asked Kampman where the person lived. Later, appellant told Purkey that he had not intended to kill anyone when he had gone to Meehan's residence, and that he did not know Hutchison had the gun. He stated that his intention was to "collect some money and dope" and to "bully the guy." Purkey was also a methamphetamine user and convicted felon, who first provided information to law enforcement about this case when facing check fraud charges. He did not receive the hoped for consideration on his pending cases, and instead went to prison with a "snitch jacket" as being an informant.

The Identification Testimony

Identification of Appellant by Micki Alger

On the night of the killing, Alger was crying and visibly shaken when police arrived. She gave police a description of both assailants, describing the man with the gun as being 20-25 years old, of average height and build, and wearing a black jacket. He had a dark hood over his head, and she never saw his face. She described the man with the knife as also being of average height and build,<sup>5</sup> about 20-25 years of age, with a thin trimmed beard. She said that he was wearing a brown "Carhartt-style" jacket,<sup>6</sup> and a black baseball cap. She thought both were White males. She got a good look at the person with the knife, standing about two feet from him. She had the opportunity to view him in the living room of the decedent's residence for a period of one to two minutes, with all of the living room lights on. She admitted that she had been a methamphetamine

<sup>&</sup>lt;sup>5</sup> She later described the man with the knife to detectives as being about 5 feet 7 inches or 5 feet 8 inches tall, with a stocky build, and the gunman as tall and slender.

<sup>&</sup>lt;sup>6</sup> Tiffani Shirley described this type of jacket as a "darkish denim brown" style jacket, and testified that she had seen appellant wearing a similar jacket near the time of these events.

user at the time of the murder, but denied having used methamphetamine on the night of the killing.

On June 11, 2002, Alger met with a police artist and helped prepare a sketch of the suspects. Over the course of the next few months, Alger was shown a series of several photo lineups. On July 26, 2002, she was shown a photo spread that included appellant (in the No. 3 position of six), but was unable to identify him.<sup>7</sup> In a later photographic lineup, on October 10, 2002, Alger identified a different individual whom she was certain was the man who had the knife.

On June 4, 2003, Alger viewed an in-person lineup containing appellant, who was located in the No. 3 position. She was admonished that the responsible person might or might not be in the lineup, that she was not obliged to identify anyone, and that if the person who committed the offense was not in the lineup, she should feel free to say so. All of the men were wearing black baseball caps. She recognized appellant as the man she had seen with the knife on June 9, 2002, "[t]he second I saw him." Detective Badger described her as "very positive" and "adamant." She noted that the only difference between his appearance in the lineup and his appearance at the time of the murder was that he no longer had the thin beard she had previously described, but only had a moustache.

<sup>&</sup>lt;sup>7</sup> Counsel stipulated that the photograph of appellant, included in position No. 3 in the photos shown to Alger on July 26, 2002 (People's Exhibits Nos. 3, 23), was taken on September 16, 1998.

<sup>&</sup>lt;sup>8</sup> The Santa Rosa Police Department form used to provide this admonition at the physical lineup was not introduced into evidence. However, a copy of the form, which Detective Badger testified is used in all cases was received as Exhibit No. M82.

As previously noted, Alger identified appellant as the knife wielding assailant at trial. When asked if she had any doubt regarding her in-court identification of appellant, she replied "[a]bsolutely not."

Identification of Appellant by James Linnell

Linnell initially told officers that Meehan had been shot by two light-skinned Hispanic men. He assumed that they might have been Hispanic because Meehan purchased his drugs from Mexicans. He told Detective Badger that he had possibly seen the man with the knife before. He also met with a police sketch artist to produce drawings of the gunman and of the man he had seen holding a palm knife. The sketch of the knife-wielding intruder did not include facial hair. The man with the knife was wearing a baseball cap. He testified that the lighting was good in Meehan's residence on that night, that he was standing four to five feet away from the intruder, and that he had an unobstructed view of the man with the knife for a minute or more. He did not get a good look at the gunman, since he had a hood pulled up over his head. He observed a tattoo on one of the hands of the man with the knife. Appellant had a small tattoo on the web of his left hand, which was stipulated to have been on his hand before June 9, 2002.

In October 2002, Linnell was shown the same photographic lineup previously shown to Alger which included appellant. He also was unable to make any identification. On April 4, 2003, both Linnell and appellant were in custody on the same calendar in

<sup>&</sup>lt;sup>9</sup> She also identified him at the preliminary hearing, and at the pretrial evidentiary hearing before the trial judge.

Linnell described the knife as "where you hold it and it sticks out between your fingers as if you can punch somebody and stab them."

Linnell was unable to identify codefendant Hutchison as the gunman, although they had been housed in the same jail module at some time after the murder. He had earlier recognized Hutchinson in a photo lineup as a person he had been in custody with.

Department 13 of the Sonoma County Superior Court. Linnell had no recollection of having seen appellant on that occasion.

Linnell attended the arraignment of appellant and Hutchison in May 2003. He attended out of "[c]uriosity," and not at the instruction of anyone in law enforcement, or from the district attorney's office. He testified that once he got a good look at appellant, he was positive that he was the man with the knife. He identified him again at the preliminary hearing, and at the pretrial evidentiary hearing, stating that he was "[a]bsolutely positive" on both occasions. At trial, he again identified appellant as the assailant with the knife "[n]o doubt."

Linnell testified that he had been using methamphetamine daily at the time of the killing, and that he had "snorted" methamphetamine a "few hours" before the shooting. He acknowledged three prior felony convictions. He also admitted that on the night of the homicide he had gathered drugs from the residence and hidden them before the police arrived. He neither requested nor received any promises from law enforcement regarding any pending matters in exchange for his testimony at trial.

Defense Identification Evidence

At trial, the defense called a forensic psychiatrist, Dr. Martin Blinder, as an expert on eyewitness identification and psychopharmacology, including the effects of use of methamphetamine. He testified as to factors affecting perception and memory, including stress, suggestion, and ingestion of methamphetamine. He opined that there is not a good correlation between confidence in identification and accuracy.

### **ISSUES**

Appellant's sole contention in this appeal is that the trial court erroneously permitted the jury to consider the eyewitness identification testimony of Alger and Linnell. Prior to empanelling a jury, appellant moved in limine to preclude this evidence,

<sup>&</sup>lt;sup>12</sup> Dr. Blinder did not testify at the pretrial evidentiary hearing.

contending that the identifications were the product of impermissibly suggestive police procedures. The court considered the testimony of witnesses, including Alger and Linnell, at a hearing conducted pursuant to Evidence Code section 402, subdivision (b), and heard argument of counsel. The motion was denied. With respect to Alger, the court found nothing unduly suggestive or unnecessary in the police procedures, and indicated that even if appellant were able to overcome this threshold hurdle, it would find the testimony admissible under the totality of circumstances. As to Linnell, the court found no police misconduct, but nevertheless applied the "totality of circumstances" test to determine that the identification was not so "fundamentally flawed" that it would be a denial of due process to admit the evidence. Appellant asserts that the trial court erred in denial of his motion, that the error resulted in a deprivation of due process of law, and that reversal is required. We disagree.

#### STANDARD OF REVIEW

We review de novo a trial court's ruling that a pretrial identification procedure was not unduly suggestive. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608-609.) We use the same standard to evaluate state and federal constitutional claims based on an unduly suggestive identification procedure. (*People v. Ochoa* (1998) 19 Cal.4th 353, 411-413 (*Ochoa*).)

### **DISCUSSION**

"[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (*Simmons v. United States* (1968) 390 U.S. 377, 384.)

<sup>&</sup>quot;The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury . . . ." (Evid. Code, § 402, subd. (b).)

A defendant bears the burden of showing that the identification procedure resulted in such unfairness that it abridged his or her due process right. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1051.)

Appellant has "the burden of showing that the identification procedure was unduly suggestive and unfair 'as a demonstrable reality, not just speculation.' [Citation.]" (*People v. Cook* (2007) 40 Cal.4th 1334, 1355 (*Cook*).) "Due process requires the exclusion of identification testimony only if the identification procedures used were unnecessarily suggestive and, if so, the resulting identification was also unreliable." (*People v. Yeoman* (2003) 31 Cal.4th 93, 123 (*Yeoman*); see also *Neil v. Biggers* (1972) 409 U.S. 188, 199 [holding that identification evidence may be admissible, even if suggestive procedures were used, if the totality of the circumstances nevertheless indicates reliability of the testimony].)

"Whether an extrajudicial identification admitted at trial is so unreliable as to violate a criminal defendant's right to due process of law under the Fourteenth Amendment is governed by principles stated in *Manson v. Brathwaite* (1977) 432 U.S. 98 . . . . Those principles—although variously phrased in various [*sic*] state and federal decisions—establish the following structure of analysis. [¶] The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242, overruled on other grounds in *People v. Edwards* 

(1991) 54 Cal.3d 787, 834-835; accord, *Cook*, *supra*, 40 Cal.4th at pp. 1354-1356; *People v. Cunningham* (2001) 25 Cal.4th 926, 989.) "In other words, '[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends.' [Citation.]" (*Ochoa*, *supra*, 19 Cal.4th at p. 412.)

## **Alger's Identification**

Appellant argued at trial and contends again on appeal that Alger's in-person identification of appellant on June 4, 2003, was tainted on the basis that: (1) appellant was the only person in the live lineup that Alger had previously seen in photographs; (2) the police failed to instruct Alger to disregard that persons in the live lineup may have appeared in the photographic lineups that she had previously seen; (3) appellant was placed in the same position in the physical lineup (position No. 3) as in a previous photo lineup; (4) the police officers made no effort to ensure that Linnell did not discuss with Alger, prior to the physical lineup, his own identification of appellant at his arraignment; and (5) police did not instruct Alger to disregard anything Linnell may have told her about his identification of appellant.

As to the alleged sins of omission of which appellant contends law enforcement is guilty, appellant points to no authority requiring an admonition that someone in a physical lineup may possibly have been included within multiple photographic lineups previously viewed, nor to any requirement that police prophylactically admonish a witness to avoid discussion with other witnesses. Appellant provides no authority for his assertion that police are required to actively discourage or prevent communication between witnesses. In any event, there was not only an absence of evidence that Linnell and Alger had any discussion regarding identification by either of appellant, but both Linnell and Alger in fact testified that there were no such discussions.

He cites to *People v. Carpenter* (1999) 21 Cal.4th 1016, 1045, for the proposition that appellant was made to "stand out" in a way to suggest identification, based on the

similar positioning between the photographic and physical lineups. In the cited reference, the court in *Carpenter* merely alluded to its earlier decision in *People v. Carpenter* (1997) 15 Cal.4th 312, 366-367, <sup>14</sup> rejecting a claim of undue suggestion due to physical dissimilarities between participants in a physical lineup.

Appellant's arguments here were rejected in very similar circumstances in *People* v. Wimberly (1992) 5 Cal. App. 4th 773. In Wimberly, the defendant complained that two witnesses identified him in a physical lineup only two days after viewing photographs, and that he was included in two sets of photographs shown to one of the victims. (Id. at pp. 788-789.) The court there found nothing improper, observing that "... California and federal courts have rejected the argument that identification procedures are impermissibly suggestive if the defendant is the only person appearing in both a display of photographs and a subsequent lineup." (*Ibid.*) More recently, our Supreme Court addressed a situation in which two different photographs of defendant's were placed in two successive photo lineups, shown to the victim approximately a month apart, with both photos placed in the same fourth position. (Yeoman, supra, 31 Cal.4th at p. 124.) The witness was unable to identify the defendant from an older photograph in the first lineup, but did identify him from a more current photograph in the second set. The court declined to find anything improper or suggestive in this procedure, noting that the defendant seemed to argue that "any further attempt to elicit a positive identification of a particular suspect from an eyewitness who does not identify the suspect from the first photograph shown must be considered unduly suggestive. But no such rule exists." (Id. at pp. 124-125.) The court agreed that using a suspect's image in successive lineups might be suggestive if the same photograph were reused, or if the lineups followed each other quickly enough for the witness to retain a distinct memory of the prior lineup, but

<sup>&</sup>lt;sup>14</sup> Superseded by statute on other grounds as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.

there different photographs of the defendant appeared in each lineup, and the two lineups were separated in time by a month. Here a year had passed between Alger's view of an outdated photograph of appellant, and her in-person identification of appellant in a physical lineup. No evidence was presented that Alger, at the time of her identification of appellant, had any recollection of having seen appellant's photograph in any of the multiple groups that she had viewed. The photograph of appellant that she had seen was taken almost five years prior to the physical lineup, on September 16, 1998, and appellant's facial hair was different. She learned only after she had made her identification, from appellant's attorney, that she had made a misidentification of a different person in one of the previous photo lineups.

With respect to appellant's assertion of undue suggestion in his placement in the physical lineup, the evidence is that the location of the participants was randomly determined by the jail personnel, and not by the investigating officers who conducted the lineup. Appellant's only argument that the placement in the physical lineup was in

shown to Alger, including that which included appellant and the group from which she misidentified another individual. There is nothing in the photo lineup which included appellant which would cause him to stand out in any way. The photographs depict six White males, all with moustaches and goatees. The photograph which Alger misidentified is a light skinned Hispanic male, similar in facial characteristics to the artist's sketch based on Alger's description and is not significantly dissimilar to appellant. We also note the likeness between appellant's appearance near the time of trial (Exhibit No. M24) and the artist's sketch (Exhibit No. M17).

Photographs of the six individuals participating in the physical lineup were presented to the trial court at the pretrial evidentiary hearing. They are not included in the record before us. Appellant, however, raises no issue as to the composition of the lineup nor as to the physical characteristics of the participants. It is undisputed that all participants wore the same jail clothing, and baseball caps. Since appellant contends only that appellant's placement was suggestive, de novo review of these photographs is not required, and it is unnecessary for us to direct that these exhibits be transmitted to this court. (See Cal. Rules of Court, rule 8.224.)

some manner suggestive is that appellant's photograph was in the third position in the photographic lineup from which he was *not* selected. Once again, there is no evidence that Alger had any recollection of the previous photos of appellant at all, or that she had any "image" of appellant in her mind at the time of the lineup based on having seen his photograph. Appellant has therefore failed to meet his burden of showing an identification procedure which was unduly suggestive and unfair " 'as a demonstrable reality, not just speculation.' [Citation.]" (*Cook, supra*, 40 Cal.4th at p. 1355.)

Appellant appears to argue that due process requires that we independently evaluate the reliability of the eyewitness testimony, even in the absence of evidence of utilization of suggestive procedures by police. This is incorrect. "Only if the challenged identification procedure is unnecessarily suggestive is it necessary to determine the reliability of the resulting identification." (*Yeoman*, *supra*, 31 Cal.4th at p. 125; *People v. Johnson* (1992) 3 Cal.4th 1183, 1216.) Although "'[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends' "(*Ochoa*, *supra*, 19 Cal.4th at p. 412), we would still find Alger's testimony admissible, as did the trial judge, under the totality of circumstances.

Appellant points to several factors which he argues undermined Alger's ability to perceive and recollect events at the time of the killing, and to her misidentification of a third party from photographs, as indicia that her trial testimony was unreliable. As discussed *post*, these were credibility issues for the jury to determine. We find nothing to indicate that her testimony was so inherently unreliable as to deny appellant due process.

### **Linnell's Identification**

Appellant asserts that Linnell's identification of appellant at appellant's arraignment was an "unduly suggestive procedure." He does not contend that law enforcement directed or suggested Linnell's attendance at the arraignment, but rather that the constitutional defect arises from the failure of the police to make any effort to

"discourage" Linnell from attending appellant's court appearances. He again cites no authority for the proposition that such affirmative prophylactic efforts are required, and references only *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052, for the general proposition that the circumstances caused appellant to "stand out as the sole possible or most distinguishable choice." It is unavailing, however, for appellant to simply label alleged inaction by law enforcement as a suggestive "procedure." "[F]or a witness identification procedure to violate the due process clause, the state must, at the threshold, improperly suggest something to the witness—i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure." (*Ochoa, supra*, 19 Cal.4th at p. 413.) The state here initiated nothing, and suggested nothing.

Once again, the argument that appellant makes here has been rejected under very similar circumstances by our Supreme Court in *Yeoman*. In that case, a witness's unilateral decision to attend the defendant's preliminary hearing was held to "not implicate the rule of *Manson v. Brathwaite*, *supra*, 432 U.S. 98, and *Neil v. Biggers*, *supra*, 409 U.S. 188, which speaks only to suggestive identification procedures employed by the People. "Thus, [the witness's] attendance at the hearing affects only the weight, rather than the admissibility, of her testimony. Because the court properly permitted the defense to cross-examine her on this matter before the jury, we see no plausible claim of error." (*Yeoman*, *supra*, 31 Cal.4th at p. 125.)

As with Alger, our determination that there was no suggestive procedure utilized by law enforcement is alone dispositive of appellant's due process claim. (*Yeoman*, *supra*, 31 Cal.4th at p. 125; *Ochoa*, *supra*, 19 Cal.4th at p. 412; *People v. Johnson*, *supra*, 3 Cal.4th at p. 1216.) We likewise reject appellant's suggestion that due process would nonetheless have required exclusion of the testimony on the ground of reliability.

Appellant again points to several factors indicating a lack of reliability in Linnell's identification, including his failure to identify appellant in an earlier photo lineup, his

failure to recognize appellant at a time when both were in custody and on the same court calendar, and his original insistence that both assailants were Hispanic. These are matters which go to the weight of the evidence, and which the jury could properly consider, along with other testimony, in evaluating the credibility of that evidence. Ultimately, the issue of identification is largely one of credibility, and the credibility of a witness's testimony is a question for the jury at trial, not an issue to be resolved in pretrial motions. (*People v. Contreras* (1993)17 Cal.App.4th 813, 824.)

The jury was appropriately instructed as to the applicable factors to be considered in evaluating identification testimony. (CALCRIM No. 315.)<sup>17</sup> Approving use of a predecessor instruction, CALJIC No. 2.92, listing substantially similar factors, our Supreme Court in *People v. Wright* (1988) 45 Cal.3d 1126, 1144, stated "[T]he listing of [eyewitness identification] factors to be considered by the jury will sufficiently bring to the jury's attention the appropriate factors. . . ." (*Id.* at p. 1143.) As suggested in *Wright*,

<sup>&</sup>lt;sup>17</sup> "You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. [¶] In evaluating identification testimony, consider the following questions: [¶] Did the witness know or have contact with the defendant before the event? [¶] How well could the witness see the perpetrator? [¶] What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, [and] duration of observation[?] [¶] How closely was the witness paying attention? [¶] Was the witness under stress when he or she made the observation? [¶] Did the witness give a description and how does that description compare to the defendant? [¶] How much time passed between the event and the time when the witness identified the defendant? [¶] Was the witness asked to pick the perpetrator out of a group? [¶] Did the witness ever fail to identify the defendant? [¶] Did the witness ever change his or her mind about the identification? [¶] How certain was the witness when he or she made an identification? [¶] Are the witness and the defendant of different races? [¶] [Was the witness able to identify other participants in the crime?] [¶] [Was the witness able to identify the defendant in a photographic or physical lineup?  $[\P] \dots [\P]$  Were there any other circumstances affecting the witness's ability to make an accurate identification? [¶] The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find that the defendant not guilty."

appellant attempted to educate the jury as to the unreliability of eyewitness testimony in certain respects, by means of expert testimony. (*Id.* at pp. 1153-1154.) The possibility of unfairness that may exist in identifications, whether from photographs or physical lineups, and the dangers of misidentification are concerns that "may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error." (*Simmons v. United States, supra*, 390 U.S. at p. 384.)

"'It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness—an obvious example being the testimony of witnesses with a bias. While identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart—the "integrity"—of the adversary process. [¶] Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.' [Citation.]" (*Manson v. Brathwaite*, *supra*, 432 U.S. at p. 113, fn. 14.)

Here counsel vigorously cross-examined each witness, including Alger and Linnell, and argued forcefully that the jury should not trust their identifications of appellant. In doing so, counsel emphasized Dr. Blinder's expert testimony regarding factors affecting validity and reliability of eyewitness identification, and the factors listed in CALCRIM No. 315, which he suggested served to discredit those identifications. The jury reached a different conclusion—one we find supported by admissible evidence.

# **DISPOSITION**

Because we find no error, we do not address appellant's contention that the *Chapman*<sup>18</sup> standard, requiring proof beyond a reasonable doubt that error was harmless, would apply.

<sup>&</sup>lt;sup>18</sup> Chapman v. California (1967) 386 U.S. 18.

The judgment is affirmed.		
	Bruiniers, J.*	
We concur:		
Jones, P. J.		
Simons, J.		

<sup>\*</sup> Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.